Punithavathi @ Pushipambigai Ponniah v Goh Mary & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S-24–1411 OF 2009
LEE SWEE SENG JC
20 SEPTEMBER 2010

Civil Procedure — Pleadings — Remuneration of executrix — Claim for remuneration by way of originating summons ('OS') — Whether there was any justification to convert OS into writ action — Whether there were serious issues as to fact — Probate and Administration Act 1959 s 43 — Rules of the High Court 1980 O 28 r 8

When Ganendra s/o Ponnusamy ('the deceased') died in February 1984, the differences and disputes that arose from administering and distributing the deceased's estate led to the commencement of a law suit by Goh Mary as the plaintiff against Punithavathi Ponniah ('the executrix') and eight others. That civil suit ended in a consent order being recorded wherein the parties agreed, inter alia, that the executrix be discharged from further acting for the estate of the deceased without admission of liability and that her remuneration as an executrix and trustee of the deceased's estate be taxed by the court in accordance with s 43 of the Probate and Administration Act 1959 ('the Act') and/or s 46 of the Trustee Act 1949. The executrix accordingly applied for her remuneration to be taxed by the court by filing the instant originating summons ('the OS'). The executrix's claim for remuneration was based on 5% of the value of the deceased's estate which according to her comprised of a list of assets valued at RM40m. Eight months after the originating summons was filed, the defendants filed an application to convert the originating summons into a writ action. The defendants contended that there were serious disputes as to the value of the deceased's estate which could not be resolved by affidavit evidence and that the court should therefore convert the OS into a writ action. The plaintiff objected to the conversion and contended that the present OS was a fairly simple application for her remuneration as an executrix which had been agreed to by way of the consent order and that there was no necessity for it to be converted into a writ action. The sole issue for determination in this case was whether there was any justification to convert the OS filed into a writ action.

Held, dismissing the defendants' application with costs:

(1) The instant application for remuneration by the executrix is akin to a taxation of costs ordered by the court. Like all taxation the dispute was not on the fact as to whether the executrix was qualified to receive remuneration for her services as an executrix, as that had been agreed by

way of the consent order, but rather the amount of remuneration she should receive. This by itself did not convert the OS into a writ action. If a taxation of costs had to be converted into a writ action with its attendant interrogatories and discovery and the calling of witnesses the simple and straight forward process would be converted into a more cumbersome and convoluted process. In any case even if the OS relied on evidence through affidavits there was provision under O 38 r 2(3) of the Rules of the High Court 1980 ('RHC') for the parties to apply for leave to cross-examine the deponent of an affidavit filed should the need arise (see paras 6 & 9–10).

(2) The fact that the plaintiff had claimed 5% of the value of the estate did not mean that the court would invariably grant her the sum prayed for. The award made as remuneration was solely at the discretion of the court, as expressly provided under s 43 of the Act. The disputes cited by the defendants were not such an insurmountable obstacle that would obviously necessitate the OS to be converted into a writ action. There was nothing to prevent the court from calling the valuer appointed by the respective parties to come to court to be examined on the basis of their valuation and the principles, parameters and postulations to be applied. Although under O 28 r 8 of the RHC this court should convert the OS into a writ action where there are serious issues as to fact, this was not a case where such a conversion was necessary or justified (see paras 11, 14, 18 & 20–21).

(3) The court took into account the fact that the executrix had not been paid at all for her expenses in terms of time and effort and the disbursements she had already incurred from 22 March 1994, that is, the time of the drawing up of the will and the administering the estate of the deceased (see para 19).

[Bahasa Malaysia summary

Apabila Ganendra a/l Ponnusamy ('si mati') meninggal dunia pada Februari 1984, perbezaan pendapat dan pertelingkahan berbangkit daripada mentadbir dan membahagi harta pusaka si mati membawa kepada tindakan guaman oleh Goh Mary sebagai plaintif terhadap Punithavathi Ponniah ('wasi') dan lapan orang yang lain. Tindakan sivil tersebut berakhir dengan suatu perintah persetujuan direkodkan di mana pihak-pihak bersetuju, antara lain, bahawa wasi dilepaskan daripada bertindak bagi pihak harta pusaka si mati tanpa penerimaan liabiliti dan bahawa pendapatannya sebagai wasi dan pemegang amanah harta pusaka si mati ditaksirkan oleh mahkamah berikutan s 43 Akta Probet dan Pentadbiran 1959 ('Akta') dan/atau s 46 Akta Pemegang Amanah 1949. Wasi seterusnya memohon agar pendapatannya ditaksirkan mahkamah dengan memfailkan saman pemula ('SP') ini. Tuntutan wasi bagi pendapatan adalah berdasarkan 5% daripada jumlah harta pusaka si mati yang menurutnya, terdiri daripada aset-aset bernilai RM40 juta. Lapan bulan

selepas SP difailkan, defendan-defendan memfailkan suatu permohonan untuk mengubah SP kepada writ tindakan. Defendan-defendan berhujah bahawa terdapat pertikaian yang serius tentang nilai harta pusaka si mati yang tidak boleh diselesaikan menerusi keterangan afidavit dan bahawa mahkamah harus mengubah SP kepada writ tindakan. Plaintif membantah terhadap pengubahsuaian dan berhujah bahawa SP ini adalah permohonan yang ringkas untuk pendapatannya sebagai wasi yang mana telah dipersetujui menerusi perintah persetujuan dan bahawa tiada keperluan untuk mengubah kepada writ tindakan. Isu utama untuk diputuskan dalam kes ini ialah sama ada terdapat justifikasi untuk mengubah SP yang telah difailkan kepada writ tindakan.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Permohonan untuk pendapatan oleh wasi adalah sama dengan kos ditaksirkan yang diperintahkan mahkamah. Seperti semua penaksiran, pertikaian bukanlah atas fakta bahawa sama ada wasi layak menerima pendapatan atas khidmatnya sebagai wasi, seperti yang telah dipersetujui menerusi perintah persetujuan, tetapi atas jumlah pendapatan yang dia harus terima. Perkara ini tidak mengubah SP kepada writ tindakan. Jika penaksiran kos harus diubah kepada writ tindakan yang diiringi dengan soal siasat dan penemuan dan memanggil saksi-saksi, proses yang ringkas dan mudah akan bertukar kepada proses yang rumit dan sulit. Dalam apa keadaan pun, jika SP tersebut bergantung kepada keterangan afidavit, terdapat peruntukan di bawah A 38 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi pihak-pihak memohon keizinan untuk memeriksa balas pembuat afidavit yang difailkan, jika keadaan memerlukan (lihat perenggan 6 & 9–10).

(2) Fakta bahawa plaintif menuntut 5% daripada nilai harta pusaka tidak bermaksud bahawa mahkamah akan terus memberikan jumlah yang dipohon. Award yang diberikan sebagai pendapatan adalah semata-mata atas budi bicara mahkamah, seperti yang diperuntukkan di bawah s 43 Akta. Pertikaian yang dinyatakan oleh defendan-defendan bukanlah rintangan yang tidak dapat diatasi yang memerlukan SP itu diubah kepada writ tindakan. Tiada apa yang dapat menghalang mahkamah daripada memanggil penilai yang dilantik pihak-pihak hadir ke mahkamah untuk diperiksa atas dasar penilaian dan prinsip yang terpakai, parameter dan anggapan yang terpakai. Walaupun di bawah A 28 k 8 KMT mahkamah ini harus mengubah SP kepada writ tindakan di mana terdapat isu-isu serius fakta, ini bukanlah situasi di mana pengubahsuaian tersebut diperlukan atau diwajarkan (lihat perenggan 11, 14, 18 & 20–21).

(3) Mahkamah mengambilkira fakta bahawa wasi tidak dibayar langsung perbelanjaannya dari segi masa dan usaha dan juga perbelanjaan yang

telah dikeluarkannya dari 22 Mac 1994, iaitu dari masa penggubalan wasiat dan mentadbir harta pusaka si mati (lihat perenggan 19).]

Notes

For cases on pleadings generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5775–6504.

Cases referred to

Fong Ah Tai & Ors v Fong Yoon Heng & Anor [2004] 7 MLJ 128; [2004] 1 LNS 233, HC (folld)

Lim Pey Lin v Chia Foon Tau (P) & Anor [2001] MLJU 626; [2002] 1 CLJ 420, HC (refd)

Neoh Ah Yan v Ong Leng Choo & Anor [2008] 7 MLJ 151; [2007] 10 CLJ 410, HC (refd)

Perspective Management Services Sdn Bhd v Seganom Sdn Bhd [2004] 4 CLJ 466, CA (refd)

Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30, HC (refd)

Legislation referred to

Probate and Administration Act 1959 s 43, s 43(1)
Rules of the High Court 1980 O 28 r 8, O 38 r 2(3)
Trustee Act 1949 s 46

S Kanaga Sundran (Raja Seelan & Assoc) for the applicant/defendants.
CP Mahendran (RR Chelliah Brothers) for the respondent/plaintiff.

Lee Swee Seng JC:

PROLOGUE

[1] As is often the case in the administration of the estate of a deceased who died rich, there is a real likelihood of disputes not just amongst the beneficiaries but also amongst the administrators and at times between the administrators of the estate and the beneficiaries. Perhaps the deceased one Ganendra s/o Ponnusamy had anticipated this and so he appointed the plaintiff, a solicitor as an executrix to his estate together with another solicitor. He died in February 1994. The grant of probate was dated 17 May 1994. However little progress was achieved in administering and distributing the deceased's estate in what was perceived as objections from and obstacles placed by some beneficiaries especially with respect to the plaintiff's action in protecting the interest of the deceased adopted daughter, one Amanda Shalini Ganendra. The plaintiff said that the reason the testator appointed her and another solicitor to be the executors and trustees of his estate was his fear that his adopted daughter Amanda Ganendra might be discriminated against in the distribution of his

estate. The said Amanda committed suicide in February 2004.

PROBLEM

[2] Differences and disputes in the administration of the estate led to a law suit by Goh Mary as the plaintiff against the following as the defendants in Civil Suit No S5–22–565 of 2000:

(a) Punithavathi @ Pushipambigai Ponniah;

(b) Loong Caesar;

(c) Ganendra Torquil @ Torkil a/l Ponnusamy Ganendra;

(d) Turid Sharmini a/p Ganendra;

(e) Rosaline Ganendra;

(f) Dennis Ganendra;

(g) Trudy Ranjini Ganendra; and

(h) Amanda Shalini d/o Ganendra.

[3] The suit ended in a consent order being recorded. The keys terms agreed by all the parties are, inter alia, that:

(a) the first defendant, without admission of liability, be and is hereby discharged as the administratrix and trustee of the estate of Ganendra s/o Ponnusamy, the deceased;

(b) the first defendant's remuneration as executrix and trustee of the deceased's estate be taxed by the court in accordance with s 43 of the Probate and Administration Act 1959 and/or s 46 of the Trustee Act 1949;

(c) the grant of probate dated 17 May 1994 of the deceased's estate be and is hereby revoked; and

(d) the letters of administration with the last will and testament of Ganendra s/o Ponnusamy dated 12 January 1994 annexed thereto be and is hereby granted in favour of the third defendant and the sixth defendant.

PRAYER

[4] Pursuant to the terms of the consent order with respect to the first defendant's remuneration to be taxed by the court, she has, as the plaintiff, in this originating summons filed on 14 July 2009 applied for her remuneration to be taxed by the court.

[5] The defendants have filed an application to convert the originating summons into a writ action on 23 March 2010, eight months after the originating summons ('OS') was filed.

PRINCIPLE

[6] The plaintiff objects to the conversion of the OS into a writ. To her this is a straightforward and fairly simple application for her remuneration as an executrix and trustee to be paid which was consented to by way of consent order. Like all taxation the dispute is not on the fact that the plaintiff is not entitled to her remuneration as an executrix and trustee of the deceased's estate as that had been agreed to by way of the consent order but rather the amount of remuneration. In other words, the question is not whether the plaintiff is qualified or not to receive her remuneration but the quantum of remuneration she should receive. That by itself does not convert the OS into a writ action merely because the defendants are disputing the value if the deceased's estate from which figure would be derived her remuneration based on a sum not exceeding 5% of the value of the assets collected by the plaintiff.

[7] Section 43(1) of the Probate and Administration Act 1959 ('the Act') provides:

> The Court may in its own discretion allow the executors or administrators a commission not exceeding five per centum on the value of the assets collected by them, but in the allowance or disallowance of the commission the Court shall be guided by its approval or otherwise of their conduct in the administration of the estate.

[8] Further s 46 of the Trustee Act 1949 reads:

> The Court may allow any trustee, other than the Public Trustee, such remuneration for his services as trustee as the Court may think fit.

[9] The application for her remuneration is akin to a taxation of costs that has been ordered by a court. Though the party to be taxed may put up a figure it is the court that exercises its discretion having regard to the objections raised by the taxing party and the circumstances of the case, the character of the dispute, the catalogue of work done, the complexity of the matter and such other concerns that would invariably find its way into what is referred to as the discretion of the court. Again if a taxation of costs has to be converted into a writ action with its attendant interrogatories and discovery and the calling of witnesses, the simple and straightforward process would be converted into some thing quite cumbersome and convoluted!

[10] I find merits in the plaintiff's objection to this conversion if the OS into a writ action on account of the fact that under O 38 r 2(3) of the Rules of the High Court 1980, there is provision for the parties to apply for leave to cross-examine the deponent of an affidavit filed should the need arise.

[11] It does not mean that merely because the plaintiff has claimed for 5% of the value of the estate that this court would invariably grant her the sum prayed for. I would readily agree with Balia Yusof JC (as he then was) in *Fong Ah Tai & Ors v Fong Yoon Heng & Anor* [2004] 7 MLJ 128; [2004] 1 LNS 233 where His Lordship held:

> ... it is trite that the power of awarding commission to the executor lies solely at the discretion of the court after taking into account the conduct of the executor in administering the estate ... The executor cannot on his own simply charge the account of the estate in claiming for the commission allowed under the Act.

[12] It was contended by the applicants/defendants that there are serious disputes on the value of the deceased's estate and that this is an issue that cannot be resolved by affidavit evidence.

[13] It appears that the plaintiff has stated in her affidavit in support that the deceased's assets comprise a long list of assets valued at RM40m and that value is derived from the suit filed by Rosaline Ganendra, a daughter of the deceased against an ex-partner for RM22m in respect of Ganendra, Ahmad & Associates ('GAA') a firm specialising in engineering consultancy services in which the deceased had a controlling interest as well as from the valuation by Arthur Anderson of the other assets totalling RM18m.

[14] The plaintiff's counsel submitted that the defendants cannot approbate and reprobate in that when they sued an ex-partner of GAA for misappropriating GAA contracts worth RM113.5m they valued the company's profit at RM22m but that when matters between the plaintiff and the defendants became acrimonious they tailored information on GAA to Price Waterhouse resulting in a valuation down drastically to RM400,000. The dispute is not such an insurmountable obstacle that would obviously necessitate the OS to be converted into a writ action. The court in the case of the parties failing to agree on the mode and method of valuation can appoint an independent valuer to value the business of GAA and the deceased's controlling interest in it. Nothing prevents the court from calling the valuer appointed by the respective parties to come to court to be examined on the basis of their valuation and the principles, parameters and the postulations applied.

[15] Yet another point raised by the defendants is the conduct of the plaintiff. Even if assuming for a moment there is a lack of probity in

administering the deceased's estate, that can be raised by affidavit evidence and the court can allow counsel to cross-examine deponents of affidavits on this limited point of a lack of probity.

[16] The plaintiff submitted that the defendants are deemed to have abandoned the challenge to the plaintiff's conduct in administering the estate by their entering into a consent order and when they conceded and consented to paying her remuneration in accordance with s 43 of the Act and the defendants are estopped from raising the misconduct as an issue now and also on ground of res judicata. The plaintiff cited in support the Court of Appeal case of *Perspective Management Services Sdn Bhd v Seganom Sdn Bhd* [2004] 4 CLJ 466 where it was held that:

> ... the claim arose from the same factual situation and for those reasons, we find that there is no difference between wrongful detention and wrongful conversion and as such the doctrine of res judicata applies to the present suit. We also agree with the appellant's counsel that even though the consent order did not state the present suit as one of the suits to be discontinued, the respondent cannot proceed with the present suit because of the doctrine of res judicata and issue estoppel.

[17] The plaintiff had also alleged that the purpose of the defendants raising misconduct and negligence is to punish the plaintiff for protecting the interest of the adopted daughter of the deceased Amanda who was a minor at all material times.

[18] For my part as s 43 expressly provided that the court shall in exercising its discretion shall have regard to the conduct of the administrators, so much of the conduct as in helping the court to properly exercise its discretion on the administrator's discretion should be allowed but it would not allow that assertions to be converted into a claim for damages for misconduct in administering the estate. In any event it does not have the potency, prospect nor power of converting the OS into a writ action.

[19] I have also taken into account that since drawing up the will and administering the estate of the deceased from 22 March 1994 the plaintiff has not been paid at all, not even for her expenses in terms of her time spent and the troubles and pain taken in administering the estate and the disbursements she had already incurred. She also lamented the fact that the defendants have dragged her into a litigation that had lasted 15 years so as to financially exhaust her. She surmised that this attempt to convert her OS into a writ action is to further delay her just remuneration.

[20] The defendants have also referred my attention to the following cases that state very clearly that where there are serious issues as to fact, then under

O 28 r 8 of the Rules of the High Court 1980 this court should convert the OS into a writ action: *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30, *Neoh Ah Yan v Ong Leng Choo & Anor* [2008] 7 MLJ 151; [2007] 10 CLJ 410 and *Lim Pey Lin v Chia Foon Tau (P) & Anor* [2001] MLJU 626; [2002] 1 CLJ 420.

[21] I have no difficulty endorsing and indeed would fully embrace the principle enunciated. However this is not a case where converting the OS into a writ action is necessary or justified.

PRONOUNCEMENT

[22] Taking into consideration all the circumstances of the case I see no necessity nor justification to convert the OS filed herein into a writ action and I had therefore dismissed the defendants' application with costs of RM2,500. Both plaintiff and defendants are at liberty to apply for leave to cross-examine deponents of the various affidavits filed herein.

Defendants' application dismissed with costs.

Reported by Kohila Nesan